TC01916

Appeal number: TC/2011/01559

INCOME TAX – foreign income – whether provision of funds from company wholly owned by foreign trust was in part a dividend paid to that trust – held, on facts, yes – whether resultant distribution of trust income assessable on beneficiary – yes – assessment confirmed and appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JARROD FRYE **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN CLARK
ELIZABETH BRIDGE

Sitting in public at 45 Bedford Square London WC1B 3DN on 16 January 2012

The Appellant in person, supported by Dr Michael Frye CBE and Malcolm Prever FAIA, FCMI

John Bentley, HM Revenue and Customs Charity Assets and Residence, Trusts and Estates, for the Respondents

DECISION

1. The Appellant, Jarrod Frye, appeals against an assessment originally made in the sum of £159,559 for the year 2002-03 in respect of foreign income.

The law

2. Although only limited submissions were made to us on the applicable law, we find it necessary to set out the relevant statutory provisions at this point, in order to put the facts of this case into their appropriate context.

3. Section 18 of the Income and Corporation Taxes Act 1988 ("ICTA 1988") provides:

> "**18 Schedule D**
>
> (1) The Schedule referred to as Schedule D is as follows—
>
> SCHEDULE D
>
> Tax under this Schedule shall be charged in respect of—
>
> (a) the annual profits or gains arising or accruing—
>
> (i) to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere,
>
> . . .
>
> (2) Tax under Schedule D shall be charged under the Cases set out in subsection (3) below, and subject to and in accordance with the provisions of the Tax Acts applicable to those Cases respectively.
>
> (3) The Cases are—
>
> . . .
>
> Case V: tax in respect of income arising from possessions out of the United Kingdom . . ."

4. Section 59 ICTA 1988 provides:

> "**59 Persons chargeable**
>
> (1) Subject to subsections (2) and (3) below, income tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income in respect of which the tax is directed by the Income Tax Acts to be charged."

5. Section 65 ICTA 1988 provides:

> "**65 Cases IV and V assessments: general**
>
> (1) . . . income tax chargeable under . . . Case V of Schedule D shall be computed on the full amount of the income arising in the year of

assessment, whether the income has been or will be received in the United Kingdom or not . . ."

6. The powers of the Tribunal in relation to a disputed assessment which a taxpayer seeks to have reduced or cancelled are set out in s 50(6) of the Taxes Management Act 1970 ("TMA 1970"):

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged by a self-assessment;
>
> (b) . . .
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

The facts

7. The evidence consisted of a bundle of documents. No formal evidence was provided by either party, but in the course of presenting his case, Jarrod Frye gave information, supported by further information from Dr Frye (Jarrod Frye's father) and Mr Prever. That information does not constitute formal evidence as such, and we consider later in this decision the extent to which we take can it into account. Similarly, the Respondents ("HMRC") set out in their Statement of Case an account of the history of the matter, including a series of statements without supporting evidence. We have had to accept HMRC's account of the history so far as it sets out a series of factual matters, on the basis that Jarrod Frye and his father did not seek to challenge that part of HMRC's account which covered agreed historical facts. We deal separately in the later part of this decision with issues which were disputed between the parties.

8. From the documentary evidence (on the extent of which we make further comment later) we find the following facts.

9. Jarrod Frye lived in the United States as a student from 1988 to 1995. (in their Statement of Case gave the commencement year as 1987, but as nothing turns on the precise date, we accept the year given by Jarrod Frye in his presentation of his case before us.) He then returned to the UK, initially only to join in with the fiftieth birthday celebrations for his father, Dr Michael Frye. In view of his mother's failing health, Jarrod Frye decided to remain in the UK.

10. Jarrod Frye was one of the beneficiaries of a trust known as the Menelaus Trust, resident in Nassau, Bahamas. The settlor of this trust had been Jack Frye. The trustees were Leadenhall Trust Company Ltd, a company with a post box address in Nassau.

11. The accounts of the latter trust (which showed its name as the "Manelas Trust") for the year ended 5 April 1991 contained the following note:

> "On the 22nd February, 1991, the Trustee exercised its discretionary powers and decided to distribute the capital of the Fund equally between [*redacted*], [*redacted*], [*redacted*] and Jarrod Frye. The distributions actually paid during the year ended the 5th April, 1991, are detailed on Schedule 1 attached to these accounts."

12. Schedule 1 to those accounts was a Distribution Statement. It showed a payment of a capital distribution made to Jarrod Frye on 27 March 1991 amounting to £40,000. It also showed an income distribution of £4,912.65 made to him on 15 May 1990.

13. The accounts of that trust for the year to 5 April 1992 showed four payments of capital distributions to Jarrod Frye amounting in total to £45,000 (incorrectly totalled on the typed accounts as £40,000, and annotated in pen by some person unknown as "45,000"). The total shown as capital distributions to beneficiaries was £180,000; in the case of the other three beneficiaries, the typed individual totals were also shown as £40,000, but no manuscript amendments had been made to those individual totals.

14. The accounts of the trust for the following period, 6 April 1992 to 25 August 1992 (described on the cover page as "Date of Final Distribution") showed Jarrod Frye as having received a capital distribution of £10,000 on 21 July 1992 and a further capital distribution of £700 on 26 August 1992. There were no income distributions, and the accounts showed a deficit of just over £2,000 as Jarrod Frye's equal share of the net income.

15. We find that the total capital distributions to Jarrod Frye from the Menelaus Trust for the years to 5 April 1991 and to 5 April 1992 and the period from 6 April 1992 to 26 August 1992 (the date of completion of the winding up of the trust) amounted to £95,700.

16. A separate settlement, initially known as the Albert Pope Settlement, was made on 14 November 1988, under the laws of the Bahamas. The name of this settlement was changed on 28 May 1990 to the "Victorian Settlement". This information appears from the draft accounts of the Victorian Settlement for the year ended 31 March 2003. Although there was no specific evidence to this effect, we understand that the named settlor of this trust was Albert Pope, the godfather of Jarrod Frye, and that the named beneficiaries include Jarrod Frye and his father Dr Michael Frye, who is also the Protector of the settlement.

17. A company called Fisheagle Investments Ltd ("Fisheagle") had been incorporated in the Turks and Caicos Islands on 29 September 1987. Subsequently (as to the timing of which there was no specific evidence before us) Fisheagle had become wholly owned by the Victorian Settlement; confirmation of this ownership appears from the draft unaudited financial statements of Fisheagle for the year to March 31 2003. Note 1 stated:

> "The company was incorporated on September 29, 1987 under the laws of the Turks and Caicos Islands. It is a wholly owned subsidiary of The Victorian Settlement, a trust established under the laws of the Commonwealth of the Bahamas."

18. On an unspecified date in 1999, Fisheagle purchased a property in the UK at 278 Overdown Road, Tilehurst, Reading. There is no specific evidence as to the price paid by Fisheagle (but see below). Jarrod Frye lived in this property from 1999 onwards as his principal private residence.

19. That property was sold in May 2002; the sale price was £317,815.

20. On 24 May 2002 Jarrod Frye purchased a property in North End Road, London W14; the price was £400,000, and information obtained subsequently by HMRC showed that this had been funded (at least in part) by a mortgage, of an unknown amount.

21. The draft unaudited financial statements for the Victorian Settlement for the year to 31 March 2003 showed that the only asset owned by that settlement was the shares in Fisheagle.

22. The draft unaudited financial statements of Fisheagle for the same period showed, under the heading "Statement of Cash Flows" and the sub-heading "Investing Activities", a "Decrease of investment in property" of £282,750. There was a "Decrease in loan receivable" of £23,000. There had been an "(Increase) in investment of securities" amounting to £64,800.

23. Those statements also showed that a dividend of £159,559 had been paid.

24. The corresponding statements for the Victorian Settlement show distributions having been made in the sum of £159,559. Under Note 4, they stated:

> "4. DIVIDEND INCOME
>
> On 16th May 2002 the Trust received a dividend in the amount of £159,559 which was in turn distributed to Jarrod Frye, a beneficiary of the Trust."

25. It appears from subsequent correspondence that Jarrod Frye's tax return for 2002-03 made no mention of any distribution from the Victorian Settlement. The only part of the return included in the evidence before us was a single page giving details of Jarrod Frye's employment income for the year from AOL UK Limited; the covering page in the bundle refers to this sheet as "Copy of the only completed page of the Tax Return for the year ended 5 April 2003". We find that, whether or not any other entries appeared in that return, it included nothing relating to income from the Victorian Settlement.

26. On 24 January 2006 Helen Adamson of HMRC's Centre for Non-Residents – Non-Resident Trusts/S739 wrote to Jarrod Frye. The initial part of her letter stated:

> "The accounts for the Victorian Settlement for the period ending 31 March 2003 show that you received a distribution from the settlement of £159,559. This income was not shown on your 2002-03 Tax Return.
>
> I have set out below my proposals for dealing with the liability for 2002-03."

She referred to her intention, in accordance with usual practice, to negotiate a contract settlement with Jarrod Frye, rather than proceeding formally by making a determination of penalties. She asked for his agreement to her calculations, and for him to tell her the reason why this income had not been shown on his return.

27. The tax due at 40 per cent was shown as £63,823, together with interest due up to 31 March 2006 of £9,617.15.

28. On 11 May 2006 Mrs Adamson wrote again to Jarrod Frye. Her letter included the following explanation:

> "You asked me to explain why I have been writing to you. In 2002-03 you received a distribution of £159,559 from the Victorian Settlement. This payment is taxable and should have been shown on your return. As a result of this omission, you have paid insufficient tax and I propose to deal with this liability by means of a contract settlement. The settlement will include the additional tax due, interest and penalties.
>
> You have told me that you were unaware of the tax implications of payments from non-resident trusts. This being the case, you should have sought appropriate advice before you completed your return. Because you did not do this, I consider that you were negligent and that penalties will be due under S95 Taxes Management Act 1970. The normal procedure is that penalties are not imposed until after the liabilities on which they are based have been established and finalised.
>
> Thank you for providing me with details of your current means. Whilst this does need addressing, the first thing we need to do is agree the tax due. This is a separate matter from your ability to pay. I have attached a copy of my computation of the additional tax due for 2002-03, together with the interest accruing up to 31 August 2006."

29. On 7 July 2006 Mrs Adamson wrote again to Jarrod Frye. She stated that she had tried to contact him by phone, but had been unsuccessful. She had spoken to an adviser [whom we do not name in this decision] who had told her that he would not be acting for Jarrod Frye. It remained Jarrod Frye's responsibility to settle the additional liabilities resulting from the omission from his 2002-03 return. As she had not received the information requested in her two previous letters, she was now proceeding formally by making an assessment for 2002-03. She stated that if Jarrod Frye did not get in touch with her, she would regard it as a sign of his lack of co-operation.

30. On 14 July 2006 HMRC issued an assessment in the sum of £159,559, the tax due being £63,823.60. On 10 August 2006 Jarrod Frye appealed against this, and applied for postponement of payment of the tax due; this application was accepted by HMRC on 31 August 2006.

31. On 4 October 2006, Harris Coombs & Company, the firm of accountants instructed by Jarrod Frye to deal with his appeal, wrote to HMRC for Mrs Adamson's attention, referring to her letter dated 12 September 2006 and enclosures. They stated:

> "We note that you would appear to have based your assessment on the draft unaudited accounts of the Victorian Settlement for the year ended 31 March 2003.
>
> Detailed conversations with our client lead us to believe that the transaction referred to in note 4 to those accounts [see paragraph [23] above] does not correctly reflect the substance of the transaction.
>
> We would refer you to points 3 and 4 of BDO's letter of 20 March 2003 concerning Michael Frye/Menalas [*sic*] Trust from where you will see that Jarrod was resident in the USA from 1987 to 1995.
>
> We understand that the amount of the distribution referred to was £96,000 [plus interest] [*the latter was their comment, not the Tribunal's*] and remained outstanding as a loan to Jarrod until 16 May 2002. In addition two further distributions of £10,000 and £700 were made to Jarrod whilst he was non-resident.
>
> A house in Reading was purchased in the name of the trustees of the Victorian Settlement, which Jarrod (a beneficiary of the trust) lived in as his principal private residence from 1999. This house was sold in May 2002 and the sales proceeds rather than being repaid to the Victorian Settlement were applied in purchasing his new property in London, which was in his own name and which [*sic*] he also took out a mortgage.
>
> The debt due from Jarrod to the Victorian Settlement was then settled from the amount held on his loan account in the underlying company.
>
> In order to balance the books of the Victorian settlement and the company the trustees simply showed a dividend received from the underlying company and an equal distribution to Jarrod.
>
> We therefore of the opinion [*sic*] that at least £106,700 plus interest of the "distribution" referred to in those draft accounts is not chargeable to UK taxation and look forward to your agreement."

32. On 27 February 2007 Harris Coombs wrote again to HMRC. They regretted the delay. They stated:

> "We have since obtained copies of the full accounts for both the Victorian Settlement and Fisheagle Investments Limited for the year ended 31 March 2003.
>
> It is now apparent that the extract (from the full accounts of the two entities held by you) of the Victorian Settlement which you forwarded to us only showed part of the transaction, which we set out for you in our letter.
>
> We understand from the trustees always had beneficial ownership of the property at 278, Overdown Road, Reading since its inception."

33. They referred to the original capital distributions having amounted to £101,105 made in the period May 1991 to 30 September 1992 and having subsequently been lent to Fisheagle as an interest bearing loan. In the light of Jarrod Frye's non-resident status at that time, they stated that those amounts should not come into charge to UK tax. In the same way the interest credited to the loan account each year prior to Jarrod

Frye's return to the UK in June 1995 should not come into charge to UK tax. They set out their calculation of the part of the interest which they considered to be chargeable. [We review that part of their letter below.]

34. They stated that "this" was the balance of the sales proceeds made available to Jarrod Frye on 16 May 2002 following the sale of "the house". They also stated that the trustees had exercised their discretion to permit him to live in the house as his principal private residence, and that accordingly s 225 of the Taxation of Capital Gains Act 1992 ("TCGA 1992") could be applied to exempt the gain from capital gains tax.

35. That letter was followed by a long silence of over two and a half years on HMRC's part. Eventually, on 11 November 2009, Mrs Adamson wrote to Mr Coombs referring to their telephone conversation on 29 October 2009. She apologised for the long delay in replying to Mr Coombs' firm. She set out her proposals for dealing with the additional liabilities arising from the enquiries into his client's self assessment returns. The income distribution to Jarrod Frye in 2002-03 was shown as £124,493. She set out the amount of tax, together with interest to 18 July 2007. She referred to the figure mentioned in Mr Coombs' letter dated 27 February 2007 relating interest accruing on the loan which had been repaid in May 2003, and said that she did not intend to include that issue within the settlement negotiations. She set out the procedure for agreeing her proposals.

36. On 10 December 2009 Harris Coombs replied to Mrs Adamson's letter. They explained that they had forwarded all previous correspondence to Dr Frye, and enclosed a letter from Dr Frye explaining his view that no tax at all should be payable, and his reasons. [As this relates to disputed matters, we consider his points below.]

37. Further correspondence and discussions between Harris Coombs and HMRC continued. On 7 October 2010 Harris Coombs requested a meeting, and set out certain information in their letter.

38. On 13 October 2010 Mrs Benbrih of HMRC, who at some earlier point had taken over the conduct of the matter, indicated that in advance of the meeting she would need documentary evidence in support of the claim that the actual capital distribution to Jarrod Frye had taken place in 1995 and that the transactions recorded in the accounts for the year ended 5 April 2003 were 'not correct'. She pointed out that the figures which HMRC had proposed for settlement were based on information and documents that Harris Coombs and their clients had provided.

39. On 15 November 2010 Mrs Benbrih wrote to Jarrod Frye setting out the history of the matter. HMRC still considered that the decision to raise the assessment in respect of 2002-03 had been correct. In the light of subsequent information, the quantum of the assessment had been revised to £124,493, giving a tax liability at 40 per cent of £49,797.20. She offered an independent review of her decision.

40. On 8 December 2010 Harris Coombs forwarded a request from Dr Frye on Jarrod Frye's behalf accepting the offer of a review; this was acknowledged by Mrs Benbrih on 9 December 2010.

41. The review was carried out by Mrs Dyer of HMRC, who wrote to Jarrod Frye on 21 January 2011 with the results of her independent review. Her conclusion was that the decision in Mrs Benbrih's letter dated 15 November 2010 should be upheld. She referred to the correspondence, and to a fax dated 17 November 2010 from the retired trustee of the Victorian Settlement, Paul Clarke.

42. Following receipt of the review letter, Jarrod Frye gave Notice of Appeal to the Tribunals Service. The date below his signature was 20 January 2011, but as indicated in section 6 of the form, he had added the review letter to the other documentation attached to the Notice.

43. Following the lodging of the Notice of Appeal, further correspondence continued, and a meeting took place on 22 June 2011 between HMRC, Dr Frye and Mr Prever, Jarrod Frye being unable to attend as a result of a family emergency. On 12 July 2011 Mrs Benbrih wrote to Mr Prever setting out the respective positions of both parties and what would be required by HMRC in terms of evidence in order to accept Dr Frye's "testimony".

Arguments for Jarrod Frye

44. Jarrod Frye explained the history of the matter. He referred to having received, after his return from the USA, letters from HMRC asking for sums totalling nearly £200,000. He had assumed that this was nonsense until he had eventually been "summoned to court". Before going to court he had been advised that if he filled in all his tax returns (up to 2005) court might be avoided. This proved to be the case and he had received a letter from HMRC stating that he had in fact overpaid tax by £1,000. This had never been repaid to him.

45. He commented that HMRC appeared to have him on a list of people to "chase" due to the fact that he was (or had been) a beneficiary of a trust, and seemed to be looking at all possibilities to obtain a payment from him.

46. He had always been on a PAYE basis, and maintained that he had never had reason to be of particular interest to HMRC. He referred to certain factual matters which we consider below. He also mentioned certain difficulties which he had recently had in relation to the resolution of his tax position.

47. He believed that HMRC was making assumptions, as they had previously, as to what might be outstanding. In the previous instance it had been deemed to be incorrect. He submitted that in the present case it was also incorrect and based on unaudited accounts which he had never seen or been able to access, and this assumption was not taking into account the actual facts.

48. He referred to various matters concerning his personal and family financial position. As these are outside our jurisdiction, we do not set out any details concerning these, as they are matters to be taken into account by HMRC if he is found to be liable to all or part of the tax assessed on him.

49. He stated that to his knowledge and belief, he had always been "above board" with his tax affairs.

50. Both Dr Frye and Mr Prever gave additional information and presented further arguments in support of Jarrod Frye's case; we refer below as appropriate to these matters.

Arguments for HMRC

51. Mr Bentley referred to the history of the assessment. This had been based on an income distribution of £159,559 to Jarrod Frye in 2002 which had not been shown on his self assessment return for 2002-03. The self assessment had initially been accepted on the normal "process now, check later" basis. This was subject to enquiry or discovery; here, the discovery provisions had been used. The assessment had been made in July 2006 by virtue of s 34 TMA 1970.

52. HMRC were aware of a number of reasons which had been given on Jarrod Frye's behalf in support of the argument that he was not liable to income tax in accordance with the assessment. However, the evidence to support that argument was insufficient.

53. Jarrod Frye had referred in argument to the difficulty in obtaining returns from HMRC. The officers working on Jarrod Frye's tax affairs had had a similar difficulty. Mr Bentley understood that in 2002-03 Jarrod Frye had been working for a public department, which meant that HMRC did not have access to information concerning him. [This understanding was challenged by Jarrod Frye and Dr Frye; however, as nothing turns on this issue, we make no further comment.]

54. HMRC's contention was that a decision to "reward" Jarrod Frye might well have been taken before 1995, but no distribution had been made to him before that time. The capital distribution to him from the Menelaus Trust was said to have been £95,700.

55. Mr Bentley referred to s 59(1) ICTA 1988, and emphasised the words "person receiving or entitled to the income". There had been no income before 1991-92.

56. Even if HMRC were to concede that a distribution had been made, there was still evidence that Jarrod Frye had received a distribution of £159,995, which Mr Bentley again emphasised that Jarrod Frye had omitted from his return.

57. Mr Bentley referred to the delay in dealing with the matter between 2007 and 2009. HMRC were not hiding from this. There had been discussions of reaching a settlement on a without prejudice basis with an interest "cut-off" and no penalty, but

this had not been accepted by Jarrod Frye and his representatives. Since Mrs Benbrih had been involved, there had been no delays.

58. HMRC remained of the opinion that the income distribution was taxable on Jarrod Frye. This was an evidential matter. The evidence had not changed HMRC's opinion. The July 2006 assessment should therefore stand, and the appeal should be dismissed.

59. Mr Bentley referred to the letter from Harris Coombs dated 27 February 2007. He commented that at the time of the assessment, the information concerning the revision had not been known. If the assessment was confirmed, interest would not be mitigated. No steps had yet been taken in respect of any penalty.

Our interim consideration

60. Following points put in reply for Jarrod Frye, we retired briefly to discuss matters of evidence. As the position was by no means clear to us from the limited information and evidence provided, we returned to ask for clarification of certain issues. To the extent appropriate, we take the responses into account in the following section of this decision.

Discussion and conclusions

61. We have referred at paragraph 6 above to s 50(6) TMA 1970. The effect of this sub-section is that it places on the taxpayer the burden of proving that the assessment is excessive. The Tribunal requires evidence to satisfy it that the latter is the case; it is not open to the Tribunal simply to arrive at that view on some form of instinctive reaction, or "on a whim". The evidential burden which is placed on the taxpayer in such circumstances is to satisfy the Tribunal that the assessment should be reduced or completely discharged. The standard of proof required is the normal civil standard, ie on the balance of probabilities.

62. Mere assertions on their own, however persuasively put, do not amount to proof; they must be supported by surrounding evidence. Further, they must be consistent with such facts as are established by supporting evidence.

63. Information provided in the course of the hearing consisted of a mixture of factual information and argument as to the effects of that information on Jarrod Frye's liability or otherwise to tax on the amount covered by the assessment. So far as this information related to facts, we treat it with caution where there is no surrounding evidence.

64. We therefore test in the light of the above principles the points put on Jarrod Frye's behalf.

65. The starting point of Jarrod Frye's case is the information given concerning the distributions from the Menelaus Trust. We are satisfied, in the light of documentary evidence considered below, that the distributions referred to above were made.

However, we have no evidence as such as to the manner of or the circumstances surrounding those distributions.

66. In the course of the discussions which continued after Jarrod Frye had lodged his Notice of Appeal, information was sought from Paul Clarke, the retired trustee of the Victorian Settlement. On 17 November 2010 he sent a fax to Dr Frye setting out his comments as follows:

> "Following our telephone conversation of 20th October, 2010 regarding your son Jarrod Frye and my recollections and research thereon, I confirm the following:
>
> It was agreed among Jarrod you and me (you as protector and me as a Trustee of the Trust controlling Fisheagle Investments Ltd,) that distributions from the Menelaus Trust would be held by the Trustee of Fisheagle for Jarrod's benefit. This decision was take in or prior to 1991 and was made to ensure that Jarrod benefitted [*sic*] by a distribution altogether of £300,000, as did all the other Grandchildren of the late J. Frye CBE at the time of his death on 7th December, 1975.
>
> The Menelaus Trust funds were held by the Trustee pending, as advised, Jarrod's decision to remain in the US or return to the UK."

67. There were no documents in the evidence before us to support Paul Clarke's confirmation of the position. Dr Frye explained to us that Paul Clarke had retired in the late 1990s, and was a Canadian aged in his eighties. To obtain the information set out in the fax, he had had to go back to the Bahamas and double check the position. This had involved looking for records in a new accounting set-up. Dr Frye accepted that it had been up to Jarrod and his advisers to get hold of Paul Clarke, but this had proved very difficult. Paul Clarke had taken time to write the letter – he being the individual who knew the situation – but Dr Frye commented that the accounts of Fisheagle and of the Victorian Settlement had been prepared by people who did not know the situation.

68. Mr Bentley's response in relation to Paul Clarke's return to look at the records was that HMRC had never seen the records, and that it would have helped for them to have been able to look at them.

69. Our conclusion, which may or may not affect the primary issue of the correctness or otherwise of the assessment, is that there is not sufficient evidence to support the information and allegations set out in the fax from Paul Clarke. Further, this fax was produced at a very late stage in the appeal process, even allowing for the considerable gap, and consequent delay, between the letter from Harris Coombs dated 27 February 2007 and HMRC's first response in October 2009. We are unable to accept the fax as itself being evidence of the matters referred to in it. However, as already indicated, we are satisfied as to the amount of capital distributions received by Jarrod Frye from the Menelaus Trust.

70. Further, we are puzzled by Paul Clarke's reference to "the Trustee of Fisheagle". If the funds distributed in Jarrod Frye's favour from the Menelaus Trust (amounting in total to £95,700 rather than the £300,000 referred to by Paul Clarke)

were to have been transferred to the Trustee of Fisheagle, this would have meant that they would have been held at the level of the trustees "of the Trust controlling Fisheagle Investments Ltd", rather than within Fisheagle itself. If the funds were held within the Victorian Settlement, they would have had no relevance to the dividend in 2002 from Fisheagle to the Victorian Settlement.

71. If the funds had been transferred to Fisheagle itself, this would have required Fisheagle as the entity holding the funds to have been doing so in the capacity of some form of informal trustee, or possibly as a bare trustee. We cannot see that holding funds in either of these ways would have been an effective way of keeping the funds "in suspense" pending the decision to be taken by Jarrod Frye whether he would remain in the USA or would return to the UK. We accept that there was another possibility: the funds could have been lent by Jarrod Frye to Fisheagle, although we do not see that this would have affected the question of their treatment for UK or US tax purposes; however, the provision of any interest to be credited to Jarrod Frye might well have relevance for such purposes.

72. Further, the matters set out in Paul Clarke's fax are not consistent with the way in which the respective accounts of Fisheagle and of the Victorian Settlement for the year to 31 March 2003 were prepared. Dr Frye sought to challenge these accounts as incorrectly prepared, and emphasised that they were drafts and not the final versions. We accept that, in the circumstances, it has not proved possible for the final versions to be obtained. However, in the absence of those final versions, the drafts are the best documentary evidence of the position, unless evidence can be adduced to show that the drafts are incorrect.

73. As already mentioned, mere assertions do not amount to evidence unless those assertions are in some way supported by evidence. Dr Frye's challenge to the draft accounts was not, in our view, so supported. We regard it as inherently improbable that these draft accounts would be incorrect, unless evidence can be produced to demonstrate this.

74. In the case of *In Re B* [2009] AC 11, the House of Lords considered the standard of proof. Lord Hoffman stated at [13]:

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

He continued at [15]:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

75. Baroness Hale also referred to the standard of proof. She commented at [70]:

> ". . . the standard of proof in finding the facts necessary to establish [the matters under the relevant legislation] is the simple balance of

> probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

76. The fax from Paul Clarke does not seek to allege that these accounts were incorrect. He gives no indication of what records he checked when visiting the Bahamas, and does not confirm whether he considered the respective accounts of the Victorian Settlement and of Fisheagle for any of the periods relevant to the present appeal, whether or not those accounts were drafts or final versions.

77. Mr Bentley referred to the letter from Harris Coombs dated 27 February 2007, and to the revised computations of Jarrod Frye's liability. He commented that this would have been the ideal opportunity to refer to the matters concerning the funds derived from the Menelaus Trust. He contended that this issue had not been raised until much later in the course of the correspondence. However, we are not satisfied that this was correct, in the light of the letters from Harris Coombs dated 4 October 2006 and 27 February 2007.

78. In the latter (see paragraphs 32 to 34 above), Harris Coombs referred to having obtained "copies of the full accounts for both the Victorian Settlement and Fisheagle Investments Limited for the year ended 31 March 2003". As established in subsequent correspondence, that comment was incorrect, as they stated in a letter to Mr Prever's firm dated 4 July 2011 that "We only hold the full set of the approved unaudited draft accounts which were supplied by [*sic*] us by Dr Michael Frye . . .")

79. We find it necessary to set out the later part of their February 2007 letter. This stated:

> "We enclose a schedule setting out our view of the tax treatment of each of the component parts of the disposal proceeds of 278 Overdown Road, Reading, and would comment as follows:
>
> A. The trustees have confirmed that the original capital distributions amounted to £101,005 and were made in the period May 1991 to 30 September 1992 and subsequently lent to Fisheagle Investments Limited as an interest bearing loan. As J. Frye was neither resident nor ordinarily resident in the United Kingdom at this time these amounts should not come into charge to UK tax.
>
> B. Interest was credited to the loan account each year and again the amount that was credited prior to J. Frye's return to the UK in June 1995 should not come into charge to UK tax.
>
> [They set out their calculation of the tax charge on the interest, the total credited being £57,552; of this, £12,332 had been credited while Jarrod Frye was non-resident, leaving £44,290 interest chargeable to UK tax.]
>
> C. This was the balance of the sales proceeds made available to J. Frye on 16 May 2002 following the sale of the house.

D. The trustees exercised their discretion to permit J Frye to live in the house as his principal private residence. Accordingly the provisions of S225 TCGA 1992 can be applied to the gain to exempt it from UK capital gains tax."

80. The schedule to their letter, headed Split of House Sale proceeds", showed the following details, although we have omitted their calculations of the tax:

"Disposal proceeds of house	£317,815
Repayment of loan account	£101,105
Interest accrued on loan above to date of repayment	£ 57,252
Excess of proceeds over loan account and interest	£124,493
Profit on sale of house	£ 35,065
	£317,815"

81. We have had considerable difficulty in understanding their explanation. We note that the total of the repayment of loan account plus interest amounts to £158,357, while the "excess of proceeds" plus the profit on sale of the house amounts to £159,558, which is £1 less than the amount of the dividend in respect of which the disputed assessment has been made.

82. Their letter refers to the Trust always having had beneficial ownership of the property. We cannot accept this statement as correct. The trustees did not own the property; Fisheagle would have had the legal ownership. The trustees would have been holding the shares in Fisheagle, and thus indirectly the property, for the benefit of the beneficiaries, in accordance with the terms of the trust. We assume, as we have no evidence before us to establish the position, that the trustees had power to permit Jarrod Frye, in his capacity as a beneficiary, to live in the property owned by Fisheagle.

83. The amount referred to as having been derived as "original capital distributions" is given as £101,105, and stated to have been lent to Fisheagle. (We consider below the position as shown by the accounts of Fisheagle for the year ended 31 March 2003.) On the basis of Harris Coombs' statement as to the ownership of the house and their comment at paragraph D of their letter that the trustees had exercised their discretion to permit Jarrod Frye to live in it as his principal private residence, it appears to us at first sight that the question of liability to capital gains tax would have related to the disposal by Fisheagle, as the non-UK resident company owned by the Victorian Settlement, rather than to Jarrod Frye as implied by their letter. [However, we have not considered the capital gains tax position in any further detail, as we do not consider it to be relevant to the question of the assessment made on Jarrod Frye.]

84. We have found that the capital distributions made to Jarrod Frye from the Menelaus Trust from March 1991 to August 1992 amounted to £95,700, rather than £101,105 as referred to in Harris Coombs' letter. However, if the income distribution of £4,912.65 made on 15 May 1990 is added to the capital distributions of £95,700,

the total becomes £100,612.65, which is very close to the figure given by Harris Coombs.

85. The accounts of Fisheagle for the year to 31 March 2003 show, on the "Statement of Cash Flows" page, under "Financing Activity", a "(Decrease) in loan payable" of £157,731. Although this does not match exactly the £158,357 total of the repayment of loan account plus interest referred to above, we find it sufficiently close to conclude that this entry in Fisheagle's accounts reflected the amounts credited to Jarrod Frye following Fisheagle's sale of the Reading property.

86. As already mentioned above, the same page of Fisheagle's accounts also shows, under "Investing Activities", a "Decrease of investment in property" of £282,750. If that amount is subtracted from the sales proceeds figure given by Harris Coombs, the balance is £35,065. This is the precise amount shown by Harris Coombs as the "Profit on sale of house".

87. As also mentioned above, if the "Excess of proceeds over loan account and interest" of £124,493 is added to the "Profit on sale of house" of £35,065, the total becomes £159,558. This is only £1 less than the amount of the dividend paid by Fisheagle, and corresponds to the amount in respect of which Jarrod Frye has been assessed.

88. On the basis that Fisheagle was the legal owner of the property, the proceeds of sale, less liabilities, belonged to it. Out of the total of £317,815, it paid £157,731 (or, according to the figures used by Harris Coombs, £158,357) to Jarrod Frye; this discharged its liabilities. This left a balance of £160,084 (or, as indicated above, £159,558) as Fisheagle's net retention following the sale. These monies belonged to Fisheagle.

89. In their earlier letter dated 4 October 2006, Harris Coombs had referred to a figure of £106,700. This was based on the amount of £96,000 plus interest distributed from the Menelaus Trust, with the addition of two further distributions of £10,000 and £700 made to Jarrod Frye while he was non-resident. We do not accept this figure, and remain of the view that the total amount of capital distributions to Jarrod Frye from the Menelaus Trust was £95,700.

90. In our view, Harris Coombs, their client Jarrod Frye and Dr Michael Frye placed the wrong interpretation on the events which had occurred. We accept, on the basis of the cash flow statement in the accounts of Fisheagle for the year ended 31 March 2003, that approximately £101,000 had been lent to Fisheagle by Jarrod Frye, being his total capital (and probably some other form of) distributions from the Menelaus Trust. However, as we have explained, the result of the sale of the Reading property in 2002 was that he received from Fisheagle the repayment of his loan together with interest. This was all that he was entitled to receive, as the balance of £160,084 or, on Harris Coombs' figures, £159,558, belonged to Fisheagle. However, he also received the latter amount.

91. For the sake of simplicity, we will proceed on the assumption that the figure of £159,558 is the correct one. As we understand the position, Jarrod Frye received the whole of the proceeds of sale of the Reading property, notwithstanding that the full amount did not belong to him. There was no suggestion that Fisheagle was lending him the £159,558. As Fisheagle had parted with this sum, its basis for doing so had to be established.

92. The only basis for doing so was to treat the sum as a dividend to its 100 per cent shareholders, the trustees of the Victorian Settlement. A company is not entitled to part with its funds without characterising that transaction as a proper transaction within its powers. It is most unlikely that a company would be empowered to make gifts of its assets to someone who was not a shareholder, even if he was a beneficiary of the trust which owned all the shares in that company. The most likely basis for a company to part with some of its assets is some form of dividend, whether an ordinary income dividend or a capital dividend. We can see no obvious reason for Fisheagle to have declared a capital dividend, and there is no evidence to suggest that it did so. We find that the dividend was a normal income dividend, to the Victorian Settlement trustees as the only shareholders.

93. That dividend income in the hands of the trustees of the Victorian Settlement was then distributed to Jarrod Frye, as described in Note 4 to the Financial Statements of the Victorian Settlement for the year to 31 March 2003 (see paragraph [23] above). As it was a distribution of trust income (but not, technically speaking, a dividend in Jarrod Frye's hands), HMRC assessed this income as a distribution to him of income from the Victorian Settlement. We find that this was a proper basis on which to make the assessment.

94. We also find that the accounts of both Fisheagle and the Victorian Settlement, far from being prepared on an incorrect basis as contended by Dr Frye and Harris Coombs, were prepared on a basis entirely consistent with the events which had occurred. Jarrod Frye had received from Fisheagle, and therefore indirectly from the Victorian Settlement, an amount belonging to Fisheagle to which he was not entitled. The only basis on which this sum could have reached his hands was for it to be treated as a dividend from Fisheagle, becoming trust income in the hands of the trustees of the Victorian Settlement, and therefore retaining its character of income when it reached the hands of Jarrod Frye.

95. In the light of the evidence, we find that the assessment was properly made and that there is no evidence justifying any reduction in the amount assessed. In particular, there was no evidence that Jarrod Frye had received any more by way of capital distributions from the Menelaus Trust than £95,700, notwithstanding the reference in the fax from Paul Clarke to an intended distribution of £300,000. We hold that the assessment stands, in the amount of £159,559, on the basis that Jarrod Frye was the person "receiving or entitled to the income" within s 59 ICTA 1988. We therefore dismiss Jarrod Frye's appeal.

96. We make no comment on the issue of his ability to pay the tax assessed, as this is not within our jurisdiction and is a matter for resolution between him and HMRC.

97. We are aware that the result of our decision is that he is liable to a greater amount of tax than would have been the case if the discussions concerning a possible agreed settlement of his liabilities had been successful. We are also aware that if the normal statutory provisions concerning interest on tax are applied, no allowance will be made for the lengthy gap in correspondence following the letter to HMRC from Harris Coombs dated 27 February 2007. Again, we have no jurisdiction over this, but HMRC may wish to consider whether it might be appropriate to make some adjustment in the interest payable to take account of the unfortunate failure on their part to proceed with the correspondence until over two and a half years later.

98. We further regard it as unfortunate that Jarrod Frye did not seek advice on his tax position in relation to the Victorian Settlement before he completed his tax return for the year to 5 April 2003. The question whether he was negligent in failing to do so is not before us, and we therefore make no further comment on this. The most unfortunate aspect of this case is that no advice as to the potential UK tax consequences seems to have been obtained by him, by the trustees of the Victorian Settlement, or by Dr Frye as Protector of that settlement before it was decided that the whole of the sale proceeds of the Reading property should be provided outright to Jarrod Frye for the purposes of purchasing the London property, rather than considering the implications of some other way of making Fisheagle's part of the funds available to him, preferably without the adverse tax consequences of "signing over" the whole sum.

99. For the purposes of making matters easier in future appeals, we wish to comment on the way in which HMRC organised the documents in the bundle. We assume that the reason for dividing up the documents and organising them into separate classifications was to allow consideration of related documents. However, we have found it difficult to deal with a bundle which does not contain the documents in chronological order. We accept that the documentation relating specifically to the formal appeal may well need to be kept separate, but in the present case we would have preferred to have the majority of the documents grouped together in date order.

100. We would also have found it of assistance to have further documentation, in particular accounts or financial statements for years preceding and following those covered by the limited collection of accounts provided in evidence. We appreciate that in the present case, the amount of such information available to the parties may have been limited, but in a dispute of this type, it is advisable for those involved to keep detailed records covering a sufficiently extended period, to allow for the possibility of tax issues being raised by a relevant tax authority.

Summary of conclusions

101. We confirm the assessment in the sum of £159,559, and dismiss Jarrod Frye's appeal.

Right to apply for permission to appeal

102. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 28 March 2012